No. 11633

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation, Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,
Appellee.

BRIEF OF APPELLEE

H. L. MAURY,
AL. G. SHONE,
EARLE N. GENZBERGER,
Attorneys for Appellee.

McKEE PRINTING CO. BUTTE, MONT.

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STATEMENT OF THE CASE.

In this case, as has been well stated by the appellant, the facts are substantially undisputed. The property of the appellee, the plaintiff below, was injured by underground mining done in ground owned by the appellant through operations conducted therein by the Anaconda Copper Mining Company under the agreement, which is set forth as Plaintiff's Exhibit 11 (R. pp. 394-414, inc.)

The appellant has abandoned all other specifications of error, and submits this appeal upon one proposition of law. (Appellant's brief, p. 20.)

Mittry Bros. Const. Co. v. U. S. (C. C. A. 9th), 75 Fed. (2d) 79;

U. S. v. Los Angeles Soap Co. (C. C. A. 9th), 83 Fed. (2d) 875;

Western Nat'l. Ins. Co. v. LeClare (C. C. A. 9th), ...Fed. (2d)....., dec. Aug. 13, 1947.

The appellant (defendant below) submits this case upon the sole contention that the lessor appellant is not responsible for the acts of the Anaconda Copper Mining Company as its lessee. Appellee contends that it is unnecessary to a decision in this case to determine whether the Anaconda Copper Mining Company under the agreement, Plaintiff's Exhibit 11 and the agreements preceding it, (Exhibits 8-A R. pp. 371-382) 9 (R. pp. 382-386) and 10 (R. pp. 386-394) was a lessee, a partner, an agent or an independent contractor. The result must be the same in any case.

APPELLEE'S POINTS AND AUTHORITIES

1. The rule in the case of *Erie Railroad Company vs. Tomkins,* 304 *U. S.* 64, applies and the Montana Law is determinative.

2. Under the law of Montana a landowner cannot escape responsibility for a duty imposed upon him by statute or common law by delegating such duty to another.

3. The contention of the appellant was decided adversely to it by this court in the case of *Butte Copper and Zinc Company v. Amerman,* (*C. C. A. 9th*), 157 *Fed.* (*2d*) 457.

4. The cases cited by appellant do not sustain its contention, and the general rule of law is that both the landlord and tenant are jointly and severally liable under the circumstances shown by the facts in this case.

ARGUMENT

1. *Rule in Erie Railroad Company v. Tomkins Applies.*

As pointed out by appellant, this case comes to this court by reason of diversity of citizenship between the plaintiff below and the defendant, a Maine corporation, and the jurisdiction of the Court is therefore derived from Section 2 of Article III, of the United States Constitution and the Statutes 28 U. S. C. 41 (1); 28 U. S. C. 225, enacted pursuant thereto.

> "Except in matters governed by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the State."
>
> *Erie Railroad Co. v. Tompkins,* 304 *U. S.,* 64, *at p.* 78, 82 *Law Ed.* 1188; 58 *S. Ct.* 817.
>
> *Stoner v. New York Life Ins. Co.,* 311 *U. S.* 336, 61 *S. Ct.* 336, 85 *Law Ed.* 284.
>
> *Sears-Roebuck v. Marhenke,* 121 *F.* (*2nd*) 599.
> *Jones v. Weaver,* 123 *Fed.* (*2nd*) 403.

therefore:

2. MONTANA LAW IS DETERMINATIVE

STATUTES

The applicable statute in Montana is Section 6773, R. C. M., 1935, reading as follows:

> "Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and

giving previous reasonable notice to the other of his intention to make such excavations."

Sec. 6773, *R. C. M.,* 1935.

but this Court has previously held that that statute is a mere expression of the common law.

"And it is well settled that a grant of the surface, with a reservation of the minerals, and the right to extract the same, does not permit the destruction of the surface, unless the right do to so has been expressed in terms so plain as to admit of no doubt."

Catron v. South Butte Mng. Co., (CCA 9th) 181 *Fed.* 941.

See also *Neyman v. Pincus,* 82 *Mont.* 467, 487; 267 *Pac.* 805, *at p.* 810.

"8743. One must so use his own right as not to infringe upon the rights of another."

Sec. 8743, *R. C. M.,* 1935.

"8748. He who can and does not forbid that which is done on his behalf is deemed to have bidden it."

Sec. 8748, *R. C. M.,* 1935.

THE GENERAL RULE.

Lindley lays down the rule:

"The right of surface support is absolute unless expressly waived. On every grant of minerals there is an implied reservation of surface support. The question of negligence is not involved."

Lindley on Mines, Vol. 3, *Sec.* 818-819, *pp.* 2010-2014).

Catron v. South Butte Mining Co., CCA, 9th, 181 *Fed.* 941,

and cases hereinafter cited.

Appellant concedes this rule of law, but contends that where the injury is done by a lessee that the lessor is not liable. This is not the law as construed by the Supreme Court of Montana.

The leading case in this state upon that subject is that of *Fagan v. Silver,* 57 *Montana* 427, 188 *Pac.* 900, in which an action was brought by an adjoining landowner against the owner of a quarry and his lessee to enjoin the operations of a stone quarry and rock crusher in a residential portion of the City of Butte. The injunction issued against the owner and his lessee. The Supreme Court of Montana said:

> "If we consider the facts as applying to the relation of landlord and tenant, appellant cannot escape liability, for the following rules would apply: 'One who erects a nuisance on his premises cannot escape liability by leasing the same, and his liability extends to the continuance of the nuisance after the lease goes into effect.' (29 Cyc. 1202; Anderson v. Dickie, 26 How. Pr. (N. Y.) 105; Robinson v. Smith, 53 Hun. 638, 7 N. Y. Supp. 38; McCarrier v. Hollister, 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 862.)
>
> " 'Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for the damages resulting therefrom—the lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; and the lessor, if he first created it, and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom is receiving a benefit therefrom by way of rent or otherwise.' (Jones on Landlord & Tenant, sec. 603.)

> "On the other hand, if we take the view that Mackey was an independent contractor, it is equally true that appellant cannot escape liability. While the case of Holter Hardware Co. v. Western Mortgage Co., 51 Mont. 94, L. R. A. 1915F, 835, 149 Pac. 489, was an action for damages, the principle involved is the same, and the rule there laid down is controlling in this case."
>
> *Fagan v. Silver,* 57 *Mont.* 427, *at pp.* 430, 431, 188 *Pac.* 900.

In the case of *Holter Hardware Co. v. Western Mortgage Co.,* 51 *Mont.* 94, 149 *Pac.* 489, which was quoted with approval in the *Fagan case,* damages resulted from debris which an independent contractor had failed to remove from the roof of defendant's building and caused damage to the plaintiff, and the Supreme Court of Montana rejected the contention that there was no liability upon the owner because the negligence, if any, was that of an independent contractor. The Supreme Court of Montana followed the case of *Railroad Co. v. Morey,* 47 *Ohio St.* 207, 7 *L. R. A.* 701, 24 *N. E.* 269 that a proprietor's liability is based upon the principle that he cannot set in operation causes dangerous to the person or property of others, without taking all reasonable precautions to anticipate, obviate and prevent these probable consequences. The Supreme Court of Montana said:

> "Under this rule, an employer may not divest himself of the primary duty he owes to other members of the community by contracting with others for the performance of work, the necessary or probable result of which is injury to third persons. * * * Every person 'must so use his own rights as not to infringe upon the rights of another' Rev. Codes, sec. 6182,"

(now Section 8743, R. C. M., 1935).

Holter Hardware Co v. Western Mfg. Co., 51 *Mont.* 94, 149 *Pac.* 489.

The rule again was before the Supreme Court of Montana in *Neyman v. Pincus,* 82 *Mont.* 467, 267 *Pac.* 805, and in that case the Court said:

> "The general rule is that, where the relation of independent contractor exists, and due diligence has been exercised in selecting a competent contractor, and the thing contracted to be done is not in itself a nuisance, nor will necessarily result in a nuisance if precautionary measures are used, and injury result, not from the fact that the work is done, but from the wrongful and negligent manner in which it is done by the contractor or his servants, the contractee is not liable therefor. (39 C. J. 1324, and notes; 14 R. C. L. 79). *There are, however, numerous exceptions to this rule, among them that indicated by the rule itself; That an employer may not divest himself of a primary duty he owes to his neighbor by contracting for the performance of work the necessary or probable result of which will be an injury to third persons.* (A. M. Holter Hardware Co. v. Western Mfg. Co., 51 Mont. 94, L. R. A. 1915F, 835, 149 Pac. 489; Fagan Silver, 57 Mont. 427, 188 Pac. 900."

Neyman v. Pincus, 82 *Mont.* 467, 484, 267 *Pac.* 805, *at p.* 810.

The Supreme Court of Montana again more recently applied this same rule in the case of *Mitchell v. Thomas,* 91 *Mont.* 370, 8 *Pac. 2d* 639, which involved the liability of the landlord for injuries due to a defect in a coal-hole cover, and the question arose as to whether or not the

landlord or the tenant, or both, were liable. The Court said:

> "We fail to see how either landlord or tenant by agreement respecting repairs may excuse himself from liability to the public."
>
> *Mitchell v. Thomas*, 91 *Mont.* 370, *at p.* 378, 8 *Pac. 2d* 639.

In the case of *Ahlquist v. Mulvaney Realty Co.*, 116 *Mont.* 6, 152 *Pac.* (*2d*) 137, the Supreme Court of Montana again held that a landlord could not escape his duty to the public under the defense that he had leased defective premises to a third person.

3. *Amerman Case Is Decisive Here*

The appellant here was likewise the appellant in the case of *Butte Copper & Zinc Company et al v. Amerman*, 157 *F. 2d* 457 (*CCA 9th*) which arose out of operations in the same mine and under the same leases and contracts between the appellant and Anaconda Copper Mining Company as are here involved. In the Record in the Amerman case the Court will find that at page 12 of the printed Record this appellant filed a Separate Answer in which it contended that "the complaint fails to state a claim against this answering defendant upon which relief can be granted." That defense was overruled by the Court below (Amerman Record, p. 24).

At the close of all of the evidence in the Amerman case, this appellant requested the Court to direct the jury to find a verdict for the defendant, Butte Copper & Zinc Company, (Amerman Record p. 940), which the Court there refused (Amerman R. p. 918). Appellant joined

with its co-defendant in appealing to this Court, and in Point 2 of the Statement of Points on Appeal (Amerman Record p. 978) assigned error of the Court below in refusing Instruction No. 2 requested by appellant, Butte Copper & Zinc Company. Based upon the identical contract here involved and the same mining operation, this Court in its decision in the Amerman case said:

> "We find no merit in appellants' contention that a verdict in their favor should have been directed."
>
> *Butte Copper & Zinc Co. v. Amerman, supra.*

4. *Appellant's Brief.*

At page 28 of Appellant's Brief, appellant quotes from the case of *Campbell v. Louisville Coal Co.,* (*Colo.*) 89 *Pac.* 767. An examination of that case shows that the suit was brought against the owner of the mine, which it leased to the United Coal Company. Plaintiff owned a lot upon the surface of the leased tract. The Court below directed a verdict for the defendant, holding that the lessee alone was liable. In reversing such decision, the Supreme Court of Colorado said:

> "Had the defendant mined the coal in the manner the lessee did, there could be no doubt of the liability of the former; but having leased the right to mine to another, is it, under the facts of this case responsible for the negligence which resulted in damage to the plaintiffs?
>
> *"A party may not accomplish indirectly that which the law prohibits him from doing directly. One cannot knowingly reap the benefit of a wrong, and escape the liabilities resulting from such wrong."*
>
> *Campbell v. Louisvile Coal Co.* (*Colo.*) 89 *Pac.* 767, *at p.* 768.

The Court then discusses the reciprocal duties of the landlord and tenant as expressed in the lease holding that the obligation to support the surface is implied by law in such a lease, and further states:

> "A landlord who authorizes, or knowingly permits, an act on the part of his tenant which it was his duty to prohibit, whereby a third person is injured, is responsible for such injury if the tenant would be liable. Riley v. Simpson, 83 Cal. 217, 23 Pac. 293, 7 L. R. A. 622."
>
> *Campbell v. Louisville Coal Co. supra.*

Upon this appeal, appellant apparently concedes that the Anaconda Copper Mining Company is liable for the damage done appellee in this case.

The court will doubtless notice that the case of *Campbell v. Louisville Coal Company, supra* was quoted with approval in the case of *Belcher Lumber Co. v. Woodstock Land & Mineral Co.* (*Ala.*) 15 *So.* (2*d*) 625, 628, *quoted* by appellant at pp. 30-31 of its Brief. We contend that the holding in that case is identical with the holding of the Montana Supreme Court in the case of Fagan v. Silver supra when it said:

> "* * * On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him, of seeing that duty performed, by delegating it to a contractor. *He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.*"
>
> *Belcher Lumber Co. v. Woodstock Land & Mineral Co.* (*Ala.*) 15 *So.* (2*d*) 625, 628.

In a special concurring opinion by Mr. Justice Matthews, in which the majority of the Court concurred in the case of *Mitchell v. Thomas, supra,* the Montana Supreme Court voiced the same opinion as that above quoted from the *Belcher Lumber Company* case to the effect that:

> "As between themselves, the landlord and tenant may, of course, contract that the latter will make the repairs necessary, but the public cannot be bound by their private contract, and the landlord cannot evade his public duty by private agreement to shift it to another, although such a contract may permit the landlord to recoup his losses from his tenant. Why, then should the mere fact that the owner has leased the building, in whole or in part, change the rule of liability recognized in all of the decisions in this class of cases? In fact those decisions which make the statement that it does, overlook the public duty of the owner and consider the duty of the landlord and tenant *inter sese.*"
>
> *Mitchell v. Thomas,* 91 *Mont.* 370, *at p.* 389, 8 *Pac.* (2*d*) 639, *at p.* 645.

Indeed, in this case the appellant and its lessee recognize appellant's liability to the public by reason of the existence of the Emma Mine and its lease to the Anaconda Company, for we find that in the 10th clause of plaintiff's Exhibit 11 (R. pp. 411-412) that the written lease provides:

> "* * * that the Zinc Company, its officers, representatives or agents, shall at all reasonable times have access to and egress from all of the premises of the Zinc Company in the control of the Mining Company hereunder, together with a right to make full inspection and survey of the same, and to obtain at

reasonable periods from the Mining Companies copies of working maps showing mining operations conducted in said properties.

"Except as hereinafter provided, the Mining Company assumes as between the parties hereto the responsibility for all claims which may arise in favor of any individual, firm, or corporation for any tort arising out of the operation of the leased premises during the period that such premises are in possession of the Mining Company, or any contract obligations incurred by the Mining Company while controlling said premises, and the Mining Company agrees to indemnify and keep indemnified the Zinc Company, its successors and assigns, against any and all such claims, and at its own cost and expense to defend against such claims and pay the cost of such defense, and any judgment recovered on such claims;"

In this case the facts show without question that the Emma Mine was owned and operated by the appellant prior to the first lease given the Anaconda Company in July, 1917, (Plaintiff's Exhibit 8-A, R. pp. 378-382). At several points in the testimony, reference was made to the "old workings," and in the original lease at page 374 of the Record, the Mining Company agrees that it would on or before the 8th day of July, 1925, sink the shaft *now on the said Emma lode claim an additional vertical distance* of 800 feet below the 800 foot level, and paragraph 3 of said original lease likewise refers to previous operations and requires additional work by the Mining Company.

The other terms of the lease define the obligations of the respective companies and are sufficient to show a knowledge on the part of the defendant, and a partici-

pation on the part of the owner in, and a benefit from, all work done.

Nellie Poague is not a party to any contract relieving either the owner, or the lessee of the owner, from the legal obligation to support the surface of the Poague property.

Therefore, we submit that those decisions that relieve the landlord from liability for the "collateral negligence" of the tenant are inapplicable here, but the rule in the *Fagan* case, *supra,* and the *Campbell v. Louisville Coal Mining* case *supra,* must be applied.

Every mine of necessity is a potential hazard to the surface above the workings.

From almost every jurisdiction where the lease is of an existing mine, the lessor has been held liable along with the lessee for injuries to the land or property of an adjoining landowner.

> "Sec. 837. A lessor of land is liable for an invasion of another's interest in the use and enjoyment of other land, occurring while the lessor continues as owner of the land, which is caused by an activity carried on upon the leased land while the lease continues, if the lessor would be liable under the rule stated in Sec. 822 had the activity been carried on by him, and if
>
> (a) at the time when the lease was made, renewed or amended, the lessor consented to the carrying on of the activity, or knew that it would be carried on, and
>
> (b) the activity, as the lessor should have known, necessarily involved or was already causing such an invasion."
>
> *Sec.* 837 *A L I Restatement on Torts, p.* 292.

Section 822 above referred to reads:

"Sec. 822. General Rule. The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,

(a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and

(b) the invasion is substantial; and

(c) the actor's conduct is a legal cause of the invasion; and

(d) the invasion is either
(i) intentional and unreasonable; or
(ii) unintentional and otherwise actionable under the rule governing liability for negligent, reckless or ultrahazardous conduct."

Sec. 822 of Restatement on Torts p. 226.

Sec. 37. Independent Contractors. One who causes the work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has left the work without reserving to himself any control over the execution of it. *But this principle has no application where a resulting injury, instead of being collateral and following from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for* if reasonable care were omitted in the course of its performance. In such a case, a person causing the work to be done will be liable even though the negligence is that of an employee of an independent contractor. * * * But in most of the cases the right to maintain the action is predicated either on the ground that the destruction or impairment of

the lateral support is a necessary result of the stipulated work, or that the obligation of the employer to take the appropriate precautions to prevent such destruction or impairment is non-delegable."

1 *Am. Jur., Sec.* 37, *p.* 527.

"Sec. 16. Land in Natural Condition. An excavating owner is liable, irrespective of negligence, for damages caused by depriving of lateral support adjoining land in its natural state, even though an independent contractor performed the work, if the damage was a necessary consequence of the excavation, but liability may also attach to the contractor or subcontractor."

2 *C. J. S., Sec.* 16, *p.* 17.

After a consideration of the authorities with reference to the primary liability in the case of *Peters v. Bellingham Coal Mines,* (Wash.), 21 Pac. (2nd) 1024, the Supreme Court of Washington said:

"The law is well settled that the right of a landowner to have subjacent support is substantially the same as his right to have lateral support; and, in the absence of some clearly expressed contractual right, given by the owner, waiving his right to lateral or subjacent support to some other person, his right to such support to his land the surface thereof is absolute, and all who disturb such support are absolutely liable, regardless of their negligence in exercising their alleged rights in adjoining property, or in the earth under the surface. This is but an application of the ancient maxim that 'one should so use his own property as not to injure the rights of another'. Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 P. 18, 4 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027; Hummel v. Peterson, 69 Wash. 143, 124 P. 400; Johnson v. Seattle, 80 Wash. 527, 141 P. 1032;

Williams v. Hay, 120 Pa. 485, 14 A. 379, 6 Am. St. Rep. 719; Piedmont Coal Co. v. Kearney, 114 Md. 497, 79 A. 1013; Burt v. Rocky Mountain Fuel Co., 71 Colo. 205, 205 P. 741; Cole v. Signal Knob Coal Co., 95 W. Va., 702, 122 S. E. 268, 35 A. L. R. 1134, and notes; 18 R. C. L. 141."

Peters v. Bellingham Coal Co., (Wash.), 21 *Pac. (2nd)* 1024.

In numerous other cases the contention has been made by the landowner that because the mining operations were done by the lessee that there was no liability to the adjoining landowner on the part of the lessor. This contention was denied in the case of *Benton v. Kernan (N. J.)* 13 *Atl. (2nd)* 825. The cases are reviewed at pp. 840-841, and later on appeal, the Court said:

"The rent is based upon royalties of all stone quarried. We think the record indicates a leasing for the particular purpose for which the premises are used, and it is not a case of a general letting followed by the operation of a business wholly of the lessee's choosing. In this situation, the decree properly runs against the owners who have leased their interest, as well as against the operators of the quarry."

Benton v. Kernan (N. J. E.) 21 *Atl. (2d)* 755, *at p.* 760.

See also the case of *Nisbet v. Lofton, (Ky.)* 277 *S. W.* 828, and the case of *Belcher Lumber Co. v. Woodstock Land & Mineral Co. (Ala.)* 15 *So. (2d)* 625.

The appellant likewise relies upon the case of *Republic Iron & Steel Co. v. Barter, (Ala.)* 118 *So.* 749, in which case there was a provision in the lease similar to that provision contained herein in the Record at page 412, and in referring to a subsidence of the surface and the duty of

the landowner as against the lessees, the Supreme Court of Alabama said:

> "It cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right and rests upon the owner of the servient estate."

The Court quotes the rule in the case of Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, and then says:

> "And this is true, though no control or direction over the work is retained and exercised."
>
> *Republic Iron & Steel Co. v. Barter, Supra.*

The Court affirmed the judgment against the lessor.

CONCLUSION.

While there may be some isolated decisions which because of the peculiar facts of the particular case denied recovery against the lessor to the adjoining landowner for acts of a lessee of a mine, such decisions are in the decided minority, and are not supported by either the weight of reason or justice, and do not appeal to the conscience of the court in this character of a case.

Appellants herein have not cited a single statute, nor decision of the Supreme Court of Montana, upon which this Court would be justified in reversing the judgment of the Court below in this case. On the other hand, there is an unbroken line of Montana decisions upholding the decision of the trial court in denying appellant's motion for a directed verdict; likewise, the decision of this Court

in the case of *Butte Copper and Zinc Company, et al., v. Amerman, (CCA 9th)* 157 Fed. (2nd), 457, determined the question herein involved contrary to the contention of appellant herein. That case was tried and decided on the identical contracts, and was a damage suit arising out of the operation in the same mine as the case at bar.

It is fundamental that the owner of land cannot escape responsibility for the performance of a legal obligation by delegating that obligation to another, regardless of the form that such delegation may take, nor can such owner do indirectly what the law prohibits him from doing directly.

Upon every principle of justice, this decision must be affirmed.

Respectfull submitted,
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EARLE N. GENZBERGER,
Attorneys for appellee.

Service of the foregoing brief acknowledged, and three copies thereof received this.....day of September, 1947.

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